Supreme Court, U.S.
FILED

001816 JUN - 4 2001

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No.

In the

Supreme Court of the United States

RAYMOND G. VARGA; KATHRYN M. VARGA,

Petitioner,

versus

ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of *Reeves v Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), did the Court of Appeals use an abrogated standard for reviewing evidence for judgment as a matter of law?

2. After the Court of Appeals Chief Judge termed defendant's actions and arguments regarding withholding of evidence as "Fraud on the Court Rules", and held that a party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence, should there not be corrective action for such Fraud on the Court Rules?

PARTIES TO THE PROCEEDINGS

Petitioners

Raymond G. Varga and Kathryn V. Varga.

Respondent

Rockwell International Corporation.

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Raymond G. Varga and Kathryn V. Varga respectfully request that this Court issue a Writ of Certiorari to review the Judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 242 F.3d 693 (6th Cir. 2000), and is reproduced in App. A at 1a-15a. The opinion and order of the United States District Court for the Eastern District of Michigan denying plaintiff's motion for a new trial or a judgment as a matter of law is unreported and is reproduced in App. B at 1b-2b.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on March 5, 2001. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides, in pertinent part: "It shall be unlawful for an employer ... to discharge an individual ... because of such individual's age. ..."

Federal Rules of Civil Procedure 50 provides, in pertinent part:

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue....

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment - and may alternatively request a new trial or join a motion for a new trial under Rule 59...

Federal Rule of Civil Procedure 26 provides, in pertinent part:

> (b) Discovery Scope and Limits. Unless otherwise limited ... , the scope of discovery is follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery ..., including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of any discoverable matter....

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner, Raymond G. Varga, brought this age discrimination suit against Respondent, Rockwell International Corporation, which fired Mr. Varga when he was 52 years of age and after he had worked 28 years for defendant. (R. 1.) After the parties had discovery, and after orders compelling production of documents were entered and seemingly complied with, the district court denied defendant's summary judgment motion and set the case for trial by jury. (R. 81).

The parties held a 12-day trial in which the jury heard Mr. Varga's evidence that defendant's decision maker

was biased because of Mr. Varga's age, defendant's evidence that it had discharged Mr. Varga and other employees as a result of a reduction in force, and that Mr. Varga was terminated because he did not have the skill sets necessary for continuation with the company. Mr. Varga also provided his response that he was immediately replaced by a younger worker, and other younger workers were kept in his department who were less educated, less qualified and less experienced then Mr. Varga; that he always had positive performance evaluations with no disciplinary actions and that he had engineering skills which were more comprehensive then those of the younger individuals who were retained, and thus could not explain his termination by defendant. Plaintiff also presented statistical evidence demonstrating that age, more likely than not, could not have been a neutral factor in the selection of the individuals who were terminated as a result of defendant's reduction in force.

During the trial, the district court denied both plaintiff's and defendant's motions for judgment as a matter of law. The jury returned a verdict for defendant.

After reviewing the evidence, the Sixth Circuit affirmed the judgment of the district court, evaluating the evidence under a standard which was aborgated by Reeves v Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). The Court of Appeals incorrectly reviewed the case at bar, perceiving that the standard for judgment as a matter of law was much higher than the standard required for summary judgment. (App. A, 15a, Footnote 2).

Following is a summary of the evidence offered by the parties at trial which demonstrates that Mr. Varga had

satisfied his burden that defendant had willfully discharged him because of his age.

(B) Mr. Varga's Evidence of Age Discrimination

Raymond Varga began work for defendant when he was 24 years of age. Throughout Mr. Varga's work history he performed at above satisfactory levels. His last five performance appraisals reflected ratings of good; excellent minus; excellent; excellent; and good + (R. 135, Ex. 1). Plaintiff's immediate supervisor for each of the foregoing appraisals was Lawrence Lemanski, who was himself terminated by defendant in early 1996 (R. 148, Lemanski TR Vol. 2, Part 2, pg. 6).

Lemanski's immediate supervisor, Ron Rogers, directed Lemanski to lower workers' performance evaluations during the last year he performed such evaluations. Testimony by Lemanski revealed: "Regardless of the job, it was stressed to bring them [evaluations] down." (R. 148, Lemanski TR Vol. 2, Part 2, pg. 15). Lemanski was told by Rogers that the bottom 10% of the people were going to be let go, and they were going to be replaced with young engineers (R. 148, Lemanski TR Vol.2, Part 2, gp. 15). Nevertheless, Rogers testified at trial that Mr. Varga was not in the bottom 10%. Rogers made it clear that plaintiff's termination was "not performance based." (R. 151, Lemanski TR Vol. 4-B, pg. 116). Regardless, Lemanski was instructed to lower Mr. Varga's last performance evaluation to a "good +" instead of the "excellent minus" which Lemanski had intended to give plaintiff. (R. 148, Lemanski TR Vol. 2, Part 2, pg. 29).

After his termination, plaintiff was immediately replaced by a younger individual, Steve Federighe. (R. 151, Rogers TR Vol. 4-B, pp. 92-93). Additionally, Kenneth Lang, another younger individual, was retained in the department, instead of plaintiff. Lang had only been employed with Rockwell for a period of eight months total, full-time employment, this being a combination of part-time and co-op experience. (R. 151, Rogers TR Vol. 4-B, pg. 84).

Mr. Varga provided unrefuted evidence of his skills and capabilities. Plaintiff's experience included, inter alia, design engineering, reliability engineering, product safety assignments, vehicle testing, computer databasing/programming and ISO 9000. Within the department from which he was terminated, plaintiff created the department's fleet test database. He did vehicle testing, working on the following product lines: transmissions, clutches, shift knobs, splitters, unitized trailer hubs, disc brakes, slack adjusters, driveline, axle lock nuts and seal tests. (R. 146, Varga TR Vol. 1, pp 59-97). Nothing in Mr. Varga's personnel file suggests a performance problem. There was no evidence provided during trial to indicate that plaintiff was not qualified to continue his position.

The decision as to which employee in the vehicle engineering department would be terminated was left to Ron Rogers. (R. 151, Rogers TR Vol. 4-B, pp. 16-22 and R. 151, Brown TR Vol. 4-B, pg. 60).

Rogers testified that he reviewed performance and skills retention of his employees in selecting those who would be terminated. (R. 151, Rogers TR Vol. 4-B, pg. 118). However, Rogers admitted that he had not included Ken Lang, the retained younger individual, in the evaluation

process, as he had recently joined the department, and "cost them significant money to bring him up a few months earlier" (only eight months before plaintiff was terminated), and it would not been "fair" to judge someone who was just "barely in the door." (R. 151, Rogers TR Vol. 4-B, pp. 118-119). Moreover, Kenneth Lang had not even had a performance evaluation in plaintiff's department by any supervisor. (R. 151, Rogers TR Vol. 4-B, pg. 121).

Plaintiff also offered statistical evidence by their expert, Michael Thompson, Ph.D., demonstrating that of the employee population under 50 years of age at the time of Mr. Varga's termination, only 3.6% were fired. Of the employee population over 50 years of age, 28.3% were fired. Dr. Thompson opined that the odds of this occurring is 1 in 10,000.00, if the process was age neutral. Dr. Thompson opined further that statistical evidence suggested that the process at Rockwell was not an age neutral process. (R. 153, Thompson TR Vol. 6, pp. 24-25).

C. Rockwell International Corporation's Articulation of Reasons for Discharge Decision

Rockwell's defense consisted of allegations that a legitimate, non-discriminatory reason motivated the adverse employment action, specifically, a reduction in force. (R. 155, Yost TR Vol. 8, Part 1, pp 9-11). This was followed also by other explanations such as defendant's undergoing a restructuring. (R. 155, Yost TR Vol. 8, Part 1, pp. 76-77 and R. 151, Brown TR Vol. 4-5, pg. 60).

Defendant's corporate designee admitted that there were no written criteria related to how individuals were to be selected for the reduction in force and/or restructuring.

(R. 151, Brown TR Vol. 4-B, pg. 57). Rogers, defendant's first line supervisor who was responsible for the final decision for terminations in his department, stated that the criteria he used to evaluate Mr. Varga with the other individuals in his department was "performance and skills retention." (R. 151, Rogers TR Vol. 4-B, pg. 118). However, defendant could not describe what skills in particular defendant wanted to retain, which Mr. Varga did not have. Even defendant's Human Resources Manager was unaware of the skill sets needed in Rogers' department (R. 156, Hannon TR Vol. 8, Part 2, pp. 96-97).

D. Petitioner's Evidence of Pretext

Mr. Varga presented evidence that he was a valuable and highly skilled employee for defendant. Larry Lemanski was his direct line supervisor for the last five years prior to Lemanski's own termination six months before plaintiff's termination. Lemanski testified that Ray Varga was an organizer, was meticulous in his work, added a lot of value, would travel when it was required, and was given the special selected job of coordinating the ISO 9000 efforts within the entire engineering group, and not just within his own department. (R. 148, Lemanski TR Vol. 2, pp. 9-16).

After Lemanski's termination, Rogers supervised Mr. Varga for a few months, and admitted that plaintiff was "not let go for performance reasons." Further, Rogers himself had picked Mr. Varga to represent the department for ISO 9000, which he handled well. Rogers testified that Mr. Varga was not in the bottom 10%, and stated that Mr. Varga was "not a bad performer." (TR 151, Rogers Vol. 4-B, pp. 76-79).

Neither supervisor, Lemanski nor Rogers, evaluated Ken Lang with regard to performance. Lemanski stated that Ken Lang was not in the department long enough for Lemanski to do a performance appraisal. (R. 148, Lemanski TR Vol. 2, pg. 24). Rogers did not evaluate Ken Lang versus Ray Varga because it had "cost them significant money" to bring Ken Lang into their department, and he felt that it would be unfair to judge him against someone who had been there 28 years. (R. 151, Rogers TR Vol. 4-B, pg. 119). Essentially, there was no legitimate effort to evaluate skill sets between younger employees and Mr. Varga by Ron Rogers, the individual making the final determination to terminate Mr. Varga. A younger individual was given preferential treatment simply because he did not have as much experience as Mr. Varga.

Plaintiff also presented evidence showing that defendant's statement of a reduction in force was pretextual. While 25 engineers and/or engineering positions were eliminated at defendant's Troy facility in 1996, at least 27 new engineers were subsequently hired, within a few months, to work at the same facility. (R. 158, G. Brown, TR Vol. 10, pg. 19). Further, defendant hired 200 new engineers worldwide between January 1995 and December 1997, while at the same time stating that they were in the midst of a reduction in force in 1996. (R. 151, G. Brown, TR Vol. 4-B, pg. 52).

Testimony was also given by Larry Lemanski reflecting age bias on the part of his own supervisor, Ron Rogers, who was the decision-maker concerning individuals selected for termination. Statements such as "aging of the labs" referring to the workforce, were made by Ron Rogers (R. 148, Lemanski TR Vol. 2, pg. 22). Lemanski also testified that if someone came into his department who was

brand new, he was instructed that he could not consider them for the bottom 10% ... "there was preference given to the youth that came in, as opposed to the people who had already been there." (R. 149, Lemanski TR Vol. 3, pg. 68).

While defendant claimed to be in the midst of a reduction in force, the corporate designee admitted that defendant was recruiting young college graduates for hire. (R. 151, Brown TR Vol. 4-B, pg. 62). This was confirmed by the testimony of former HR Manager Douglas Gee, who stated that there was a philosophy of hiring new young college graduates each year. The goal for 1996 was to hire 80 per year. (R. 149, Gee TR Vol. 3, pg. 99).

Plaintiff's economic expert, Michael Thomspon, Ph.D. testified that he observed a large disparity of difference, according to age, when he ran his statistical analysis. (R. 153, Thompson TR Vol. 6, pg. 23). He found that 25% of employees over 50 had been fired, and when breaking this number down into individuals over 60, 33% over 60 had been fired, compared to only 3.6% of those under age 50 who were fired. When taking all ages over 50, 28.3% had been terminated. As stated by Dr. Thompson, the odds of this occurring is 1 in 10,000.00 if the process was age neutral. (R. 153, Thompson, TR Vol. 6, pp. 24-25).

Adverse inferences can be drawn from all of the above. Defendant lacked any evidence of performance deficiencies by plaintiff. They had no legitimate explanation for their disparate treatment of Mr. Varga versus younger employees in the company. The CEO even admitted, in testimony, that he would be "extremely disappointed if all

employees had not been evaluated equally across the board." (R. 156, Yost, TR Vol. 8, Part 1, pg. 99).

E. Discovery Withheld By Defendant

The Court of Appeals highlighted the egregiousness of defendant's actions in withholding two specific documents, Exhibits 69 and 70. Defendant's decision to withhold these documents because they viewed them as usable solely for impeachment purposes, according to Judge Batchelder, was "so devoid of merit as to be species." (App. A, 5a) However, the Court of Appeals made light of the other documents which were not produced by defendant, which were just as significant.

During the course of trial, defendant introduced material, heretofore not produced, which was incorrect, incomplete and false. Among the documents which were not provided were the "Redesign Headcount Implementation - Reduction Form" for each individual who was laid off as part of the reduction in force. Testimony by Gregory Brown indicated that every individual who was laid off would have a corresponding Headcount Reduction Form. (R. 151, G. Brown, TR Vol. 4-B, pp. 52-55). Pat Hannon, defendant's HR manager, corroborated this fact. (R. 156, Hannon TR Vol. 8, Part 2, pp. 92-93). Nonetheless, plaintiffs were not provided with a form for each individual who was listed as having been laid off or terminated as part of the reduction in force.

The Court of Appeals minimized the significance and relevance of not producing these documents. However, the fact that defendant did not produce the forms was a blatant violation of Rule 26(b). Here, again, defendant held back

materials which were responsive to a proper discovery request.

Defendant also produced varied and contradictory evidence during trial relative to the exact number of individuals terminated by defendant's restructuring/reduction in force. Defendant's pre-trial exhibits listed 25 people as having been terminated. Then, during trial, defendant testified that 46 people were "affected" by the "redesign". (R. 158, G. Brown, TR Vol. 10, pp. 31-33). Defendant was unable to reconcile the data provided pre-trial with that given during trial. In it's attempt to explain the obvious discrepancy, defendant's corporate designee stated that people may have been "caught up sometime later" than their previously provided form would have shown. (R. 158, G. Brown, TR Vol. 10, pp. 34-35). This was then contradicted by Pat Hannon, Human Resources Manager, who testified that "no additional names were added to the list of persons to be reduced." (R. 156, P. Hannon, TR Vol. 8, Part 2, pp. 42-43).

The trial judge even expressed concern over apparent discovery abuses by defendant. Judge Tarnow was "troubled" by Mr. Brown's testimony, which "basically indicated for the first time, as a result of his testimony a week or two ago, that he did some research, ..." This "research" was done during trial. (R. 158, Court/Counsel, TR Vol. 10, pp. 165-166). Such research should have been done during discovery, and not after trial started.

The most harmful of defendant's "surprise" information, offered to the jury during trial, and later proven to be false, was testimony by Gregory Brown stating that out of twenty individuals who had been listed as severed as part of the reduction in force, ten had actually taken early

retirement. Of the ten that remained, four were over 50 and six were under 50. (R. 158, Brown, TR Vol. 10, pp. 12-14). This information was vehemently objected to. Nonetheless, Mr. Brown was permitted to testify along these lines, over plaintiff's objection. (R. 158, Brown, Vol. 10, pp. 11, 16-17, 27).

Brown's information (1) came as a complete surprise; (2) did not coincide with exhibits and documents provided previously; and (3) was false. Further, the only reason the falsity of this information came to light, was because plaintiffs were aware that some of the individuals cited by Brown as having taken "early retirement" were actually part of another age discrimination lawsuit against Rockwell.

Upon doing "further research" defendant found out that the corporate designee had been incorrect in portraying to the jury that ten people had taken "early retirement." Regardless, the jury heard the incorrect information, took notes on the incorrect information, and clearly did not understand the negation of the incorrect information, as seen in their final verdict.

While plaintiffs did request sanctions against defendant for these discovery abuses, specifically for the unfair surprise and the unjust and prejudicial effect this had on the jury (R. 158, Court/Counsel TR Vol. 10, pp. 163-164), sanctions were not awarded. Instead, the parties agreed to a stipulation to be read to the jury. However, plaintiffs assert that the stipulation was read incorrectly, and even after objection by plaintiffs, the stipulation was not corrected. (R. 159, Court/Counsel, TR 11, pp. 94-97).

The above mentioned abuses are not all-inclusive. They affected the foundation of plaintiffs' case, as well as the outcome of the case. Jurors were confused, and testimony which was inaccurately given by defendant could not be erased from the jurors' minds.

F. The Jury Verdict

The jury received instructions from the trial judge. However, these instructions did not include instructions which conform with the analysis contained in Reeves v. Sanderson Plumbing Products, Inc. The jury found no cause for action in favor of defendant.

G. The Appeal

The Sixth Circuit reviewed evidence pursuant to Toth v. Yoder, 749 F.2d 1990 (6th Cir. 1984) and decided that petitioner had produced insufficient evidence to carry a motion for judgment as a matter of law. The court found that the evidence "recounted in plaintiffs' brief would be enough to withstand summary judgment, but the standard for judgment as a matter of law is much higher." (App. A, 15a, Footnote 2)

The court found plaintiff's arguments, outside of the request for judgment as a matter of law, to be completely meritless. However, the court spent a great deal of time reprimanding defendants for not producing evidence which they had a duty to produce prior to trial.

The court recognized that plaintiffs had propounded discovery requests to Rockwell to produce;

> any and all documents including, but not limited to, inter- and/or intra-office documents, relating to the layoff and termination of Raymond Varga ... Any and all documents containing an analysis of plaintiff and/or comparison of plaintiff to other employees, which served as a basis for a decision to layoff and/or terminate Raymond Varga ... plaintiffs noticed a subpoena duces tecum to Rockwell, specifically asking for 'any memoranda, notes, or other documents referring to the implementation of defendant's RIF plan that resulted in plaintiff's separation on August 26, 1996.' (App. A, 4a-5a)

The court also noted that Gregory Brown, Rockwell's corporate designee, had not produced all of the documents requested. Defendants were then ordered to provide "all of the documents identified at Mr. Brown's deposition, to the extent they exist." (App. A, 4a-5a). However, Trial Exhibits 69 and 70 were not produced in response to that order.

The court found that there was a paucity of authority to support Rockwell's contention that they were allowed to hold back documents. At oral argument defense counsel was asked to explain the absence of cases supporting their contention that a party, served with specific discovery requests, may withhold otherwise relevant evidence if that party unilaterally concludes that the only useful purpose for the evidence at trial is impeachment. Not finding the response had merit, Chief Judge Martin accused defense counsel of having committed fraud on the court rules.

The court, in its decision, found defendant's response to be "nonsense" (App. A, 6a) when defendant posited that the lack of published cases "suggests that Rockwell's rule is one that is universally accepted among all trial lawyers and judges alike." The court took this occasion to "emphasize what Rule 26(b) makes perfectly clear":

> The recipient of a properly propounded document request must produce all responsive, non-privileged documents without regard to the recipient's view of how that information might be used at trial. A party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial."[1] (App. A, 7a)

The Court of Appeals, while admonishing defendant, sends a message that the Court Rules are meaningless, as nothing will be done about violation of those Rules, nor about the judge-termed "fraud on the court rules." The significance of the Court of Appeals' dictum regarding Rule 26(b) is miniscule, if defendant is not held accountable for it's violation. Defendant's attorneys had a duty to be completely honest in conducting litigation. As the court stated in oral argument, had plaintiffs been made aware of defendants' surprise evidence, they may have very well

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[1] Rockwell's post-argument attempt to justify its failure to disclose these properly requested documents on the basis of Halbasch v Med-Data, Inc., 192 F.R.D. 641 (D. Or. 2000), a case dealing with with Rule 26(a)(3)'s exception to the automatic disclosure requirements for evidence to be used "solely for impeachment purposes," is disingenuous at best.

made different decisions in pursuing their case, and/or would have had an opportunity to investigate the contents of the documents which were not produced.

SUMMARY OF ARGUMENT

The Sixth Circuit held that proof that a member of the disfavored class was replaced by a member of the favored class, combined with evidence that the employer's explanation is pretextual and with additional circumstantial evidence, are insufficient to grant judgment as a matter of law. They have further stated that the standard of the review of evidence is "much higher" for judgment as a matter of law, than it is for summary judgment. This contravenes Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). The Reeves court expressly stated that "the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, such that "the inquiry under each is the same." Id, at 150 citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251, (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The fact that Mr. Varga was replaced by a younger employee, with still another younger employee also being retained in Mr. Varga's engineering department, and the fact that the younger employee was not evaluated against Mr. Varga for possible selection for termination, thus being given preferential treatment, leaves the logical inference that age is the reason for Mr. Varga's termination.

Additionally,

> (1) Evidence shows that there were no guidelines and/or written criteria

for selection of employees to be eliminated;

(2) Evidence shows there was active recruitment of college graduate engineers, with a targeted goal of hiring 80 such graduates slated to be hired in the same year that petitioner was terminated, while defendant purported to be conducting a "reduction in force";

(3) Evidence confirmed that defendant hired 27 engineers, when at least 25 engineers were terminated as a result of defendant's RIF; and,

(4) Statistical evidence demonstrated that a disproportionate number of employees over 50 were terminated as compared to the entire population of individuals terminated during defendant's reduction in force.

The above enumerated proofs provide circumstantial evidence sufficient to cause a jury to infer that age bias was the cause of Mr. Varga's dismissal.

The Court of Appeals stopped short of issuing a ruling which would have significance to parties who do not comply with the Federal Court Rules to disclose evidence in response to properly propounded requests. At best, parties who violate the Court Rules are assured, from this decision, that nothing meaninful and of consequence will happen for such violations.

REASONS FOR GRANTING THE WRIT

I. In light Of Reeves v Sanderson Plumbing Products, Inc., The Proper Interpretation of The Evidence Which Should Be Reviewed To Determine Whether Judgment As A Matter Of Law Should Be Granted is The Same Standard Used In Considering A Summary Judgment Motion.

Prior to Reeves v. Sanderson Plumbing Products, Inc., the Courts of Appeals have articulated differing formulations as to what evidence a court is to consider in ruling on a motion for judgment as a matter of law. Reeves, at 149. See also Venture Technology, Inc. v. National Fuel Gas Distribution Corp., decided with Schwimmer v. Sony Corp. of America, 459 U.S. 1007, 1009 (1982).

Some decisions, according to Reeves, have stated that "review is limited to that evidence favorable to the non-moving party. See, e.g., Aparicio v. Norfolk and Western R. Co., 84 F.3d 803, 807 (6th Cir. 1996)" Id at 149. However, "most Courts of Appeals have held that review extends to the entire record, drawing all reasonable inferences in favor of the non-movant. See, e.g., Tate v. Government Employees Ins. Co., 997 F.2d 1433, 1436 (11th Cir. 1993); Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)." Id at 150.

The Reeves court abrogated the opinion in Aparicio, by stating that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law. While the court recognized that all reasonable inferences must be drawn in the favor of the non-moving party, Judge

O'Connor explained that "the court should give credence to the evidence favoring the non-movant, as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses," citing Wright & A. Miller, Federal Practice and Procedure §2529, at 300(2d ed. 1995).

The Sixth Circuit, herein, ignored the evidence supporting plaintiff, which was uncontradicted and unimpeached, and which came from disinterested witnesses.

First, plaintiff was replaced by a younger individual, Steve Federighe, with yet another younger employee, Ken Lang, also being retained in Mr. Varga's department. This testimony was proffered by Ron Rogers, Mr. Varga's first-line supervisor at the time of his termination.

Also uncontradicted is the fact that defendant had an active recruiting program for college graduates, and was planning to hire 80 new college graduate engineers in the same year that defendant claims they were undergoing a reduction in force.

Unrefuted, is the fact that Ken Lang, a younger employee, was not evaluated against Raymond Varga, when the selection was being made to terminate employees under the RIF. Unrefuted also is the fact that Raymond Varga had the qualifications for his position, that he was not in the bottom 10% of the workforce, which had been targeted for reduction, and that he had positive performance reviews and no disciplinary actions during his entire 28 years of service.

Plaintiffs also presented uncontradicted statistical evidence revealing that older individuals were terminated in

significantly higher numbers (28.3% of individuals over 50 years were fired) versus a significantly lower number of individuals who were under 50 who were fired (3.6%). While defendants presented an "Adverse Impact Analysis" which showed "that after the layoffs, the average age of Rockwell's workforce was reduced by 0.1 years" (App. A, 14a), this study did not purport to be a statistical analysis such as that done by plaintiffs' expert, Dr. Michael Thompson. Defendant's Adverse Impact Analysis merely averaged the ages of over 660 employees before the RIF, with a second averaging of ages after reducing the total work population by the 27 employees who were terminated as a result of the purported RIF. (R. 156, Hannon, TR Vol. 8, Part 2, pg. 101). This "impact study" did not analyze what percentage of the employee population over 50 and under 50 were actually let go.

As in Reeves, the Sixth Circuit "disregarded critical evidence favorable to petitioner - namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation." Id at 152.

In light of the Reeves case, the case herein should be remanded for a new trial, to afford petitioner the opportunity to present jury instructions utilizing the analyses in Reeves, and/or in the alternative, judgment as a matter of law should be afforded petitioner given the uncontradicted and unimpeached evidence presented by petitioner which supports a finding that age was a factor in the termination of Raymond Varga from his employment with defendant.

II. Fraud On The Court Rules Is Essentially Fraud On the Court And Defendant Should Be Held Accountable For Willfully And Intentionally Violating The Court Rules.

The Court of Appeals spent a great deal of time reprimanding defendants for not producing documents which defendant felt they had no duty to produce. It is difficult to understand and justify the detailed reprimand given by the court to defendants, with the court's ultimate conclusion that the defendant's violations are harmless. As stated earlier, during oral arguments Chief Judge Martin accused defense counsel of having perpetrated a "fraud on the court rules." While there is no case law discussing fraud on the court "rules" per se, the result would appear to be similar to cases involving "fraud on the court."

A similar situation existed in Demjanjuk v. Petrovsky, et al., 10 F.3d 338 (6th Cir. 1994), a civil action against government attorneys by John Demjanjuk for the government not having produced properly requested documents, resulting in the extradition of plaintiff to Israel to face indictment of war crimes. While the magnitude of the results in Demjanjuk are of a monumental nature, the principles discussed and ruled upon in said case apply to the case at bar.

Mr. Demjanjuk's discovery requests demonstrated to the court that he had "asked for virtually every piece of evidence that is at issue in these proceedings, but the government did not provide the evidence because it believed it was under no duty to do so." Id at 348.

The court in Demjanjuk explains that "cases dealing with fraud on the court often turn on whether the improper

actions are those of parties alone, or if the attorneys in the case are involved. As an officer of the court, every attorney has a duty to be completely honest in conducting litigation." Id at 352. The decision to withhold information from plaintiffs in the case at bar is on point with what occurred in Demjanjuk. It was a direct action by defendant's attorneys. As such, it was not the "party" acting alone when the decision to withhold documents was made.

The final determination of Demjanjuk resulted in the judgment of the district court being vacated on the grounds of prosecutorial misconduct that constituted fraud on the court. The same or similar determination should have been made in Varga.

Defendant should reap the consequences of their actions, and have the judgment of the trial court set aside, and allow for a new trial, or in the alternative, judgment as a matter of law in favor of petitioner.

CONCLUSION

For the reasons stated herein, petitioner would request the grant of certiorari and the vacating and remanding of this case for a new trial in light of the decision in Reeves v. Sanderson Plumbing Products, Inc., a case which was decided during the same week of the parties' oral argument. Petitioner did cite the Reeves case in oral argument on June 16th. However, it was not utilized in the Court of Appeals' analysis of this case.

CONCLUSION

For the reasons stated herein, petitioner would request the grant of certiorari and the vacating and remanding of this case for a new trial in light of the decision in Reeves v. Sanderson Plumbing Products, Inc., a case which was decided during the same week of the parties' oral argument. Petitioner did cite the Reeves case in oral argument on June 16th. However, it was not utilized in the Court of Appeals' analysis of this case.

Respectfully submitted,
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No. 99-1206

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Raymond G. Varga; Kathryn M. Varga, Plaintiffs-Appellants,

v.

Rockwell International Corporation, Defendant-Appellee.

June 16, 2000, Argued

March 5, 2001, Decided

March 5, 2001, Filed

COUNSEL:
ARGUED: Eva I. Guerra, LAW OFFICES OF EVA I. GUERRA, W. Bloomfield, Michigan, for Appellants.

Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Appellee.

ON BRIEF: Eva I. Guerra, LAW OFFICES OF EVA I. GUERRA, W. Bloomfield, Michigan, for Appellants.

Ernest R. Bazzana, PLUNKETT & COONEY, Detroit, Michigan, for Appellee.

JUDGES:
Before: MARTIN Chief Judge; BATCHELDER and MOORE, Circuit Judges.

OPINIONBY:
ALICE M. BATCHELDER

OPINION:

ALICE M. BATCHELDER, Circuit Judge. Plaintiffs Ray and Kathryn Varga appeal the jury's verdict and the district court's entry of judgment in favor of Rockwell International ("Rockwell"), Ray Varga's employer, on the Vargas' federal and state law claims of age discrimination. The Vargas raise numerous claims of evidentiary error at trial, and further assign as error the district court's failure to grant their motion for judgment as a matter of law or, in the alternative, for a new trial. Finding that none of these assignments of error are meritorious, we affirm the judgment of the district court.

I.

In 1995, the Heavy Vehicle System of the Automotive Operations Division of Rockwell (HVS), was performing poorly. The Rockwell Board of Directors insisted that HVS' performance be turned around or the division would be sold or shut down. In early 1996, Management began a program to restructure HVS, described by Rockwell's CEO as taking a "blank paper" approach, with the goal of increasing efficiency and reducing expenses by 40 percent. Managers worldwide were asked to start over and design the most efficient organization possible. The skills of each current employee were then assessed to determine whether and where to place that employee within this new organization.

Ray Varga was employed in the Vehicle Test Group of HVS. That Group consisted of four salaried engineers, of whom Varga was the most senior with 28 years of experience with Rockwell. The other three engineers in the Vehicle Test Group had 22 years', 7 years', and 3 years' experience with Rockwell. Mr. Federighe, an engineer in another work group, had 7 years' experience with Rockwell. As part of the restructuring, Rockwell terminated Varga, retained the other three engineers in the Vehicle Test Group and moved Mr. Federighe into that group. Federighe worked in the Vehicle Test Group for 30-60 days before he was transferred to another department.

Varga and his wife sued Rockwell for wrongful termination and for age discrimination under both the federal age-discrimination laws ("ADEA") and Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"). Rockwell asserted as an affirmative defense that Varga's termination was part of a far-reaching reduction in force ("RIF") affecting employees throughout HVS's entire organization.

Rockwell moved for summary judgment. The district court granted the motion as to the wrongful-termination claim, but denied it as to the age-discrimination claims, allowing those claims to proceed to trial. Pretrial discovery did not go smoothly, and plaintiffs filed a motion to compel the requested discovery. The motion was granted by a magistrate judge and affirmed by the district court over Rockwell's timely objections. The case was tried to a jury, which returned a verdict of "no cause for action" in favor of the defendant. The plaintiffs' motion for judgment as a matter of law or, in the alternative, for a new trial was denied by the district court and this timely appeal followed.

In this appeal, the Vargas argue that certain evidence was erroneously admitted at trial, that they were deprived of information necessary to present their claims because of

Rockwell's stonewalling tactics during discovery, and that they were deprived of a fair trial. We consider each of these alleged errors in turn.

II.

A. **Admissibility of evidence**

1. **Trial exhibits 79 and 80**. Varga's direct supervisor, Larry Lemanski, was also terminated as part of the 1996 RIF. Lemanski and several other RIF'd employees sued Rockwell in a separate lawsuit for violating the ADEA. As a witness in the Vargas' trial, Lemanski testified that he was instructed by his supervisor, Ron Rogers that (1) Rockwell wanted to eliminate the older engineers and replace them with younger engineers, so he should lower evaluation scores that year to facilitate this goal, and (2) he should rank the employees and cut out the bottom 10%. Lemanski testified that he held Varga's work in high regard and would have ranked him in the middle as compared to the other engineers.

On cross-examination, however, Rockwell's lawyers presented Trial Exhibits 69 and 70 to Mr. Lemanski. These exhibits were two draft, handwritten lists ranking the engineers who were under Mr. Lemanski's supervision at that time. On both drafts, Varga was ranked 14th out of 17 engineers. The documents noted the criteria followed by Lemanski in creating the ranking. A note at the bottom of the page read: "Who is doing the best in there [sic] job/classification/[illegible]. This is performance relating to position and how much is contributed to the company effort." On redirect, Lemanski explained that at the time the ranking was created, Varga was on a special assignment under Rogers and, for that reason, Lemanski had discounted Varga's performance for purpose of ranking the engineers as a whole.

It is undisputed that Trial Exhibits 69 and 70 were created during the course of Mr. Lemanski's employment with Rockwell; they were removed from the Rockwell premises by Mr. Lemanski when his employment was terminated; and Rockwell obtained copies of the documents in the course of pretrial discovery in Lemanski's ADEA suit against Rockwell. It is also undisputed that Rockwell never produced copies of Trial Exhibits 69 and 70 in response to the Vargas' discovery requests--which included requests that Rockwell produce "any and all documents including, but not limited to, inter- and/or intra-office documents, relating to the layoff and termination of Raymond Varga" and "any and all documents containing an analysis of plaintiff and/or comparison of plaintiff to other employees, which served as a basis for a decision to layoff and/or terminate Raymond Varga." Finally, it is undisputed that the plaintiffs noticed a subpoena duces tecum to Rockwell, specifically asking for "any memoranda, notes, or other documents referring to the implementation of defendant's RIF plan that resulted in plaintiff's separation on August 26, 1996;" that Gregory Brown was Rockwell's corporate designee in response to the subpoena; that during Brown's deposition, it became apparent that he had not produced all of the documents requested; that the district court, ordered the defendants to provide "all of the documents identified at Mr. Brown's deposition, to the extent they exist;" and that these two documents were not produced in response to that order.

The plaintiffs argue in this appeal that they were unfairly prejudiced by Rockwell's failure to produce these documents before trial, and the district court's decision to allow Rockwell to use the exhibits at trial is reversible error. Rockwell counters that it had no obligation to produce the documents because it viewed them as usable solely for impeachment purposes. As we shall explain below, plaintiffs' claim of error is meritless. But we will

first address Rockwell's argument, which is so devoid of merit as to be specious.

The Federal Rules of Civil Procedure allow litigating parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). The rules are broad, and litigants are required to comply with all properly propounded document requests. Fed. R. Civ. P. 34. While it is arguable that Lemanski's lists were not identified at Brown's deposition, Trial Exhibits 69 and 70 clearly fall within the plaintiffs' original document request, and Rockwell was obligated to produce them.

In support of its decision to hold back the documents, Rockwell cites ***Macivor v. Southern Pacific Transp. Co., 1988 U.S. Dist. LEXIS 5495,*** No. 87-6424- *E, 1988 WL 156743* (D. Or. Jun. 9, 1988). This unpublished, district court opinion is not precedential authority in this Court. More importantly, the case is wholly inapposite. In **Macivor,** the plaintiff-employee, who was suing his employer for damages related to an alleged on-the-job injury, propounded an interrogatory asking if the employer had conducted any secret surveillance of the plaintiff. **Relying on a local rule** that specifically removed such records from discovery **in personal injury cases,** the district court held that the surveillance films were not discoverable. Therefore, Rockwell's out-of-context quote from **Macivor** -". . . the only practical way to preserve the prophylactic effect of impeachment evidence . . . is to keep its existence as well as its contents unknown" - is not only not persuasive, it is misleading.

The paucity of authority to support Rockwell's contention is telling. At oral argument, counsel for Rockwell was asked to explain the absence of cases supporting his rule that a party served with specific

discovery requests may withhold otherwise relevant evidence if that party unilaterally concludes that the only useful purpose for the evidence at trial is impeachment. Counsel responded that the lack of published cases suggests that Rockwell's rule is one that is universally accepted among all trial lawyers and judges alike. That response was a fine debate technique, but it is nonsense. The reason there are no cases to support Rockwell's evidentiary proposition is that it is patently wrong. We take this occasion to emphasize what Rule 26(b) makes perfectly clear: the recipient of a properly propounded document request must produce all responsive, non-privileged documents without regard to the recipient's view of how that information might be used at trial. A party may not, under any circumstances, hold back materials responsive to a proper discovery request because it prefers to use the evidence as surprise impeachment evidence at trial. n1

That said, however, the ultimate question we must consider is not whether Rockwell wrongly withheld the documents, but whether the district court--which was never presented with that question--committed reversible error by allowing Rockwell to use Trial Exhibits 69 and 70 to cross-examine Lemanski. During the trial, when Rockwell offered these documents into evidence, plaintiffs' counsel made no mention of the documents' not having been provided during discovery; although counsel objected to the fact that the documents had no dates on them, once the time frame was established, she made no other objection to either their use or their admission. In fact, as to Trial Exhibit 70, the district court specifically asked plaintiffs' counsel if she had any objection, and she said, "no."

The general rule for reviewing evidentiary rulings on appeal is that a party "may not assert as error the introduction of evidence unless a timely objection is made."

Helminski v. Ayerst Labs., 766 F.2d 208, 211 (6th Cir. 1985). Because plaintiffs failed to object at trial, they may not complain about the admission of these exhibits now.

2. **Testimony of Patrick Hannon.** At trial, Rockwell's Human Resources officer, Patrick Hannon, testified--without reference to any documentation--about various statistics related to the age impact of the RIF. Plaintiffs' counsel objected to the testimony because she had not been provided with the documents supporting it. In fact, the only documentation with regard to this statistical information that Rockwell provided plaintiffs prior to trial was an Adverse Impact Review prepared by a Mr. Pautsch, showing a breakdown of Rockwell's work force by age before and after the RIF. Pautsch's discovery deposition contains his testimony that the Adverse Impact Review was the only documented study that Rockwell conducted; however, plaintiffs' counsel never inquired of him whether there were other, undocumented studies undertaken by Rockwell in connection with the RIF. And although Hannon was included on Rockwell's witness list prior to the close of discovery, plaintiffs' counsel did not attempt to take his deposition. The district court reserved ruling on the issue of whether Rockwell had failed to comply with plaintiffs' discovery request seeking relevant statistics, permitted Hannon to continue to testify from memory about the age-related impact statistics, and allowed the plaintiffs to cross-examine him with regard to the documentation for that testimony.

Rockwell argues it was under no obligation to provide plaintiffs with details of Mr. Hannon's undocumented study because the plaintiffs asked for documents. Further, Rockwell claims that the issue has been waived because plaintiffs neither filed a motion to strike the testimony nor preserved the issue for appeal. As with the Lemanski

documents, we believe that plaintiffs waived their right to pursue this issue on appeal. But, even if the argument was not waived, we would find that it is without merit. Rockwell included Hannon on its witness list, and plaintiffs received that list before the close of discovery. During the trial, the district judge investigated plaintiffs' allegations of unfair surprise, found them to be without merit, and allowed the testimony to continue. The district court did not abuse its discretion here.

3. **Testimony of Gregory Brown.** During the trial, a dispute arose surrounding the testimony of Mr. Brown relating to certain documents provided by Rockwell. On the first day of his testimony, Mr. Brown testified about Trial Exhibit 19, a list of employees who were laid off at the same time Ray Varga was. Mr. Brown testified that of the twenty names on Trial Exhibit 19, ten of them took a voluntary early retirement.

Mr. Brown returned to court the following day and testified that he checked his records overnight and was mistaken in his testimony from the day before. He explained that in order to obtain their pension benefits immediately, several employees who had been selected for layoff applied for early retirement status, and he confirmed that Rockwell's records do not distinguish between those who voluntarily sought early retirement and those who elected early retirement after being selected for layoff.

Plaintiffs' counsel argued that because four of the "early retirement" terminations were plaintiffs in Lemanski's separate lawsuit against Rockwell for age discrimination, at least those four must not have sought early retirement voluntarily. She claimed this new information was unfairly prejudicial because her statistical expert had left all early retirement employees out of his calculations, assuming those had been voluntary terminations. She argued that because

early retirement was available only to those employees age 55 and older, the statistics calculated by her expert--reflecting older workers who were involuntarily terminated--were too low. She also argued vigorously that she had been sandbagged by Rockwell's discovery abuses.

After much discussion, the parties settled the dispute by agreeing to a stipulation that the judge read to the jury:

> The attorneys have stipulated . . . One is that all of the discovery orders and requests have been complied with prior to trial. So, that's not a concern of yours.

As to the second point, when Mr. Brown testified yesterday and talked about early retirement, he indicated that the computer elected early retirement - or showed early retirement for ten people, because that was the last entry or employment action which was taken with respect to each of the employees, the four employees. They were, in fact, included in the reduction in force and were laid off prior to electing the early retirement, and therefore there's no need for Mr. Brown to be called back as a witness. And you should take Exhibit 19 as all the people listed in Exhibit 19 were in fact included in the reduction in force. So, Exhibit 19 is exactly the same as before Mr. Brown testified.

The court then asked, "Does that accurately reflect the agreement, Ms. Guerra [plaintiffs' counsel]?" She responded, "Just the first point I think was a little broader than we had agreed. If we could sidebar." The court denied her request for an immediate sidebar and deferred the issue until the next break. When the court returned to the issue, plaintiffs' counsel complained that during the negotiation of the stipulation, the language about the first point had been that Rockwell's responses to discovery requests had been

"appropriate," but in the stipulation the court had said that Rockwell had complied with all of the discovery requests. The court flatly responded that the stipulation had been limited to the subject of the discovery surrounding the voluntary retirements.

On appeal, plaintiffs reassert the dispute regarding Brown's testimony that the stipulation had purported to resolve, and they challenge the accuracy of the stipulation as it was read to the jury. Rockwell responds that the stipulation is binding, and there is no basis for this Court to consider plaintiffs' claim on appeal.

In this Circuit, "stipulations voluntarily entered by the parties are binding, both on the district court and on us." ***Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1038 (6th Cir. 1991).*** It is clear from the transcript of the proceedings that plaintiffs' counsel was an active participant in drafting the stipulation and that she agreed to the substance of the stipulation with regard to the "voluntary" versus "involuntary" early retirement evidence. Plaintiffs are therefore bound by that portion of the stipulation, as are we, and there is no merit to their complaint that the district court erred in reading it to the jury. Further, the record reflects that the language of the stipulation regarding Rockwell's response to plaintiffs' discovery requests was not exactly the same as the language discussed by the parties during negotiations. The difference, however, is simply not material. The district court held that the jury would not reasonably have concluded that the language referred to anything other than the specific discovery materials to which the remainder of the stipulation was directed. We find no abuse of discretion in that ruling.

4. **The missing headcount forms.** On appeal, plaintiffs complain that during discovery they requested copies of

certain "Headcount Reduction Forms;" that Mr. Brown testified that one such form was completed for each RIF'd employee; and that plaintiffs still have not received copies of those forms. At various times throughout the trial, however, in response to plaintiffs' complaints that some of these forms had not been produced, the district court observed that the information contained on these "headcount forms" in general was minimal, and information which would have been contained in the forms not produced was contained in Trial Exhibit 28. We have reviewed the headcount forms that Rockwell did produce during discovery, and we conclude that the district court's observations were entirely correct. We find it highly unlikely that Rockwell's failure to produce some of these documents altered the outcome of the Vargas' trial. Moreover, the Vargas could and should have raised this issue during pretrial discovery, when a motion to compel could have been considered by the district court, and any failure by Rockwell to produce the documents could have been cured. We find no abuse of discretion here.

We pause to make one additional comment. We have exhaustively reviewed the record before us, and find the bickering between counsel for Rockwell and counsel for the Vargas throughout the pretrial discovery and at trial was remarkable. It is clear that the district court was confronted with unusually contentious counsel, and we commend him on the enormous restraint he exercised in presiding over this matter.

B. **Rebuttal testimony.**

Plaintiffs argue that they were prejudiced by the district court's denial of their request to call Mr. Pautsch as a rebuttal witness. Because Pautsch prepared the Adverse Impact Review for Rockwell, plaintiffs proposed to call him as a rebuttal witness to explain the source of the numbers in

that analysis and to clarify the "confusing" testimony presented by Messrs. Hannon and Brown. Although plaintiffs had deposed Pautsch, he was not on their witness list, nor had he been called as a witness by Rockwell.

We have previously considered the scope of the district court's discretion in admitting rebuttal evidence at trial. See ***Benedict v. United States, 822 F.2d 1426 (6th Cir. 1987).*** In **Benedict**, the plaintiffs argued they should be allowed to present an expert on rebuttal because the trial testimony of defendant's expert (in 1986) contradicted his earlier 1980 opinion. The defendant argued that the plaintiffs should have been on notice, as early as 1983, that the expert's opinion had changed. The district court ruled that the rebuttal testimony would not be allowed because it logically belonged in the plaintiffs' case-in-chief.

In evaluating the propriety of the district court's ruling, this court explained:

> A trial judge's determinations regarding the order of proof and scope of rebuttal testimony will not be disturbed absent an abuse of discretion . . . . In the exercise of sound discretion, the district court may limit the scope of rebuttal testimony, to that which is directed to rebut new evidence or new theories proffered in the defendant's case-in-chief. However, "where . . . [the] evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal. Furthermore, with respect to 'real rebuttal evidence,' the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief.

Id. at 1428.

We reversed the district court in **Benedict** because the proffered testimony was "real rebuttal evidence." Real rebuttal evidence is evidence presented to rebut "new" evidence, and evidence is new "if, under all the facts and circumstances, . . . the evidence was not fairly and adequately presented to the trier of fact before the defendant's case-in-chief." *Id. at 1429.*

In the case before us here, however, we do not believe the rebuttal testimony plaintiffs sought to introduce constitutes "real rebuttal evidence." The district court ruled that plaintiffs knew that Pautsch's impact study was highly relevant to their case; that plaintiffs knew that Hannon was on Rockwell's witness list, but they chose not to depose him in advance of trial to find out what he had to say; and that the testimony plaintiffs contended Pautsch would present in rebuttal was not inconsistent with the testimony plaintiffs wanted to rebut and its substance had already been presented to the jury through direct and cross examination of other witnesses. The record supports those findings. The district court did not abuse its discretion by denying plaintiffs the opportunity to present Pautsch as a rebuttal witness.

C. **Judgment as a matter of law.**

A district court may grant a motion for judgment as a matter of law only if the evidence is such that "reasonable minds could not differ as to the conclusions to be drawn from the evidence." ***Toth v. Yoder, 749 F.2d 1190, 1194 (6th Cir. 1984).*** Plaintiffs argue that they should have been granted a judgment as a matter of law because the evidence in their favor was overwhelming. n2 That is simply not the case.

Plaintiffs are correct in their assertion that there was documented evidence that Varga's supervisors thought he did a good job. Under Rockwell's restructuring plan, however, adequate performance did not guarantee an employee's retention in the restructured organization. Rockwell's management received a directive from the Board of Directors to restructure, reorganize and improve efficiency by 40%. They were not looking to cut dead wood; they were looking to keep only optimal performers. The impact study showed that after the layoffs, the average age of Rockwell's workforce was reduced by 0.1 years. This is not statistically significant. Finally, plaintiffs' key evidence of discriminatory intent came from Larry Lemanski's testimony. But because Lemanski himself was terminated as part of the RIF, a jury easily could have discredited his testimony as being motivated by sour grapes. On this record, it cannot be said that the reasonable minds could not differ on the central question of whether or not Varga's age was the motivating reason for his layoff.

D. **Fed. R. Civ. P. 61.**

Plaintiffs argue that because the district court made so many erroneous evidentiary rulings, their trial was fundamentally unfair and the verdict should be reversed under Fed. R. Civ. P. 61. According to ***Westwood Chemical, Inc. v. Owens-Corning Fiberglas Corp.***, *445 F.2d 911 (6th Cir. 1971)*, a plaintiff must prove that the evidence it was precluded from offering was more than cumulative or that the court abused its discretion before a reversal under Fed. R. Civ. P. 61 is appropriate. See ***id.*** *at 918* ("In short, plaintiff has failed to show that if any of the District Court's evidentiary rulings were erroneous, plaintiff's right to a fair trial was prejudiced."). As we have already discussed, we find no abuse of discretion in any of the evidentiary rulings challenged by the plaintiffs. The

plaintiffs did not present an overwhelming case, and there has been no miscarriage of justice.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

n1 Rockwell's post-argument attempt to justify its failure to disclose these properly requested documents on the basis of ***Halbasch v. Med-Data, Inc., 192 F.R.D. 641 (D. Or. 2000)***, a case dealing with Rule 26(a)(3)'s exception to the automatic disclosure requirements for evidence to be used "solely for impeachment purposes," is disingenuous at best.

n2 Plaintiffs also argue that they presented evidence on all the necessary elements of an age discrimination claim, and that the jury could have inferred discrimination from the evidence. In support of their argument, plaintiffs cite precedents such as ***Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121 (6th Cir. 1998)*** (reversing denial of summary judgment). We agree that the evidence recounted in plaintiffs' brief would be enough to withstand summary judgment, but the standard for judgment as a matter of law is much higher. Plaintiffs' evidence is not sufficient to carry a motion for judgment as a matter of law.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed January 22, 1999]

No. 97-76295

Raymond G. Varga and
Kathryn M. Varga,

Plaintiffs,

V

Rockwell International
Corporation

Defendant.

ORDER

At a session of said Court, held in the U.S. Courthouse and Federal Building, at Detroit, Michigan, on JAN. 22, 1999

PRESENT: HON. ARTHUR J. TARNOW
U.S. DISTRICT JUDGE

The Court has reviewed the motions and supporting

documents. Plaintiff has failed to persuade the Court that reasonable minds could not differ as to the conclusions to be drawn from the evidence. The parties introduced ample testimonial and documentary evidence from which the jury could reasonably and legitimately conclude that Mr. Varga's age was not a motivating factor in the decision to terminate his employment.

The Court finds that Plaintiff was not prejudiced by the discovery process, the six day delay in trial, nor any revelation that a juror may work for a vendor of the Defendant. Therefore, Plaintiff's Motion for New Trial (135-1) or a Judgment as a Matter of Law (135-2) is Hereby **DENIED.**

/s/_____
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATED: Jan. 22, 1999

Supreme Court, U.S.
FILED
JUL 5 2001
OFFICE OF THE CLERK

No. 00-1816

In the

Supreme Court of the United States

RAYMOND G. VARGA; KATHRYN M. VARGA,

Petitioner,

versus

ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ROCKWELL INTERNATIONAL CORPORATION

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36 pp

QUESTIONS PRESENTED

1. Whether the district court properly denied, and the circuit court properly affirmed the denial of, the motion for judgment as a matter of law made at the conclusion of all proofs by the plaintiffs, the parties having the burden of proof?

2. Whether this Court should decline to consider plaintiffs' argument concerning the district court's decision to permit respondent to utilize Trial Exhibits 69 and 70 to cross-examine plaintiffs' witness, Mr. Lemanski, where plaintiffs' counsel failed to object to the admission of those exhibits and stipulated to a jury instruction that defendant had properly met its discovery obligations?

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II. THIS COURT SHOULD DECLINE TO REVIEW PLAINTIFFS' ARGUMENT CONCERNING THE ADMISSION OF EVIDENCE USED SOLELY FOR THE PURPOSE OF IMPEACHMENT BECAUSE THE ARGUMENT MADE BY PLAINTIFFS IN THE SIXTH CIRCUIT WAS NOT MADE IN THE DISTRICT AND THE ARGUMENT MADE BY THE PLAINTIFFS NOW WAS NOT MADE IN EITHER LOWER COURT. 27

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STATEMENT OF THE CASE

A. Introduction.

In 1995, the Heavy Vehicle Systems (HVS) business unit of defendant, Rockwell International Corporation,[1] ("Rockwell"), failed to meet established business goals and reported an unacceptable financial performance.[2] Further, industry experts were forecasting a significant downturn in the industry. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1, pp.9-11). The Rockwell Board of Directors indicated to Mr. Yost that HVS had to be turned around or it would be sold or shut down. As a result, in early 1996 HVS management with the approval of the Board of Directors of Rockwell instituted a program to restructure HVS to enhance efficiency and reduce expenses by 40 percent. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1, p.24).

Management within each HVS function was asked to "start with a blank piece of paper" and design what the organization should look like in order to run as efficiently as possible. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1,

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[1] Effective October 1, 1997, Rockwell's Automotive Operations became a distinct corporation called Meritor Automotive, Inc.

[2] In November, 1994, the entire upper management team which had been in place at HVS was terminated due to the poor performance of the company. (Testimony of Larry D. Yost, former President of HVS and current Chairman and Chief Executive Officer of Meritor Automotive, Inc.; Tr., 11/23/98, Vol. 8, Part 1, pp.4-7).

pp.33-35). In addition, management was asked to identify those skills necessary for employees to have in the restructured organization. Having made that determination, management was to examine the skill sets of the existing employees to see who best fit the new organization. (Yost Testimony, Tr., 11/23/98, Vol. 8, Part 1, pp.40-42, 79-80).

Each and every employee was considered as a potential candidate for inclusion in the restructuring and reduction in force. Those that best fit were retained. This process resulted in a far-reaching reduction in force that impacted HVS employees in North and South America, Asia and Europe.

Raymond Varga's work area, the vehicle test group, consisted of four salaried engineers. The two most senior engineers and one engineer junior to the Raymond Varga continued with the restructured company. As it was felt that Varga's skill set did not match the needs of the restructured company, he was included in the reduction in force.[3]

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[3] Mr. Varga testified that he was given six months' pay as part of his severance package. (Tr., 11/12/98, Vol. 1, p.13). During that same period, his medical, life and disability insurances were continued as were Rockwell's contributions to his savings plan. (Tr., 11/12/98, Vol. 1, p.13). For every dollar Mr. Varga invested in the savings plan, Rockwell contributed $.75. (Tr., 11/12/98, Vol. 1, p. 96). The value of the savings plan when he cashed it out in September, 1996 was $667,856.26. (Tr., 11/12/98, Vol. 1, pp.97-98).

(Continued on next page.)

Some of plaintiff, Raymond Varga's, job duties were distributed among the three engineers who remained in the department, Jack Worrall, Gerald Lawruk, and Kenneth Lang. In addition, Stephen Federighe, a younger man with greater departmental experience and performance appraisals superior to those of Varga, transferred into the department after Varga was discharged and assumed some of Varga's other duties in addition to his own.

Mr. Federighe remained in the department for approximately 30 to 60 days before he transferred to a position in another department. By the end of the year, Mr. Lang, the most junior of the other three engineers also transferred to a new job. Thereafter, plaintiff Varga's job and that of Mr. Lang were done by hourly-rated, non-engineers. (Testimony of Ron Rogers, Former Manager of HVS's Vehicle Test Group and current Engineering Manager, Test Group, Meritor, Tr., 11/17/98, Vol. 4(B), pp. 64-121; Tr, 11/18/98, Vol. 5, pp.74-150).

(Continued from previous page.)

Mr. Varga also testified that Rockwell had an "85-point" system for pension benefits. The number of points was calculated by adding a person's age plus the number of years he had worked at Rockwell. (Tr., 11/12/98, Vol. 1, p.12). Mr. Varga had only 80 points in August, 1996. Nonetheless, Rockwell gave him a "slider" into retirement which meant that even though he was no longer employed, he could collect a pension from Rockwell at p. 56 in the same amount he would have received if he had worked until he accumulated 85 points. (Tr., 11/12/98, Vol. 1, pp.12-13, 31).

Mr. Varga took exception to his discharge and commenced this action alleging that he was wrongfully terminated and discriminated against on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et. seq.* and the Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2201, *et. seq.*

Following a three-week trial, the jury determined that ". . . Defendant Rockwell International Corporation [did not] intentionally discriminate against Plaintiff Raymond Varga by using age as a determining factor in the decision to discharge Mr. Varga." (Tr., 12/03/98, Vol. 13, p.6).

B. Trial proceedings.

While aware of Rule 15.2's admonition that a brief in opposition "should be stated briefly," Rockwell is compelled to provide this Court with a full, complete recitation of exactly what occurred at trial since that is necessary to an understanding of the petition filed by the plaintiffs and the questions involved.

1. Trial exhibits 69 and 70.

During the course of his direct examination by plaintiffs' counsel, Larry Lemanski (who had been plaintiff's immediate supervisor between 1991 and January, 1996 when he was terminated as part of a reduction in force and who had himself sued Rockwell for age discrimination, (Tr., 11/13/98, Vol. 2, pp.4-15), testified that his supervisor, Ron Rogers, had instructed him to "bring down" everybody's performance evaluation and that the bottom

10 percent of the people were going to be let go.[4] (Tr, 11/13/98, Vol. 2, pp.15-21). He then testified that he would have given plaintiff an excellent minus rating in 1995 but that Mr. Rogers forced him to bring it down to a good plus. (Tr., 11/13/98, Vol. 2, pp.28-29).

On cross-examination, defense counsel showed Mr. Lemanski proposed Exhibit 69 and told opposing counsel that the exhibit was not in the exhibit book because it was offered for impeachment. (Tr., 11/16/98, Vol. 3, p.38). There was no substantive objection from plaintiff's counsel.[5] Mr. Lemanski identified the document as a ranking he had done, in 1995, of the people in his department from 1 to 17 and which also included his proposed performance evaluations of those individuals. (Tr., 11/16/98, Vol. 3, p.38). He testified that the document showed that he had ranked plaintiff 14th out of 17, after earlier stating that had he had to force rank the people in his department he would have ranked plaintiff towards the center – not towards the bottom, (Tr., 11/16/98, Vol. 3, p.37), and that he had originally rated plaintiff "good", which was contrary to his testimony on direct examination. (Tr., 11/16/98, Vol. 3, pp.39, 44). He was then shown Exhibit 70, which was also admitted without objection, (Tr.,

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[4] Mr. Lemanski made it clear that Mr. Rogers did not tell him to include only older people in the bottom 10 percent. He, Rogers, did not want only younger people included in the bottom 10 percent. (Tr., 11/16/98, Vol. 3, p.25).

[5] The only objection made by plaintiffs to Exhibit 69 was the lack of foundation as to its date. That objection was cured by further testimony and Exhibit 69 was admitted. (Tr., 11/16/98, Vol. 3, pp.40-41).

11/16/98, Vol. 3, p.42), which showed the changes which Mr. Rogers had made to Mr. Lemanski's recommendations. Faced with his own document, Mr. Lemanski was forced to admit that Mr. Rogers had, in fact, **raised** plaintiff's 1995 performance evaluation from good to good plus.[6] (Tr., 11/16/98, Vol. 3, p.44).

2. Patrick Hannon.

At trial, defendant called Patrick Hannon, Senior Director of Human Resource Strategic Planning and Leadership Development. (Tr., 11/23/98, Vol. 8, Part 2, pp.3-4). Consistent with the earlier testimony of Mr. Yost and Mr. Rogers, Mr. Hannon testified that in April, 1996, there was a significant restructuring of the business at Rockwell. (Tr., 11/23/98, Vol. 8, Part 2, p.7). The goal of the restructuring was an attempt to reduce Rockwell's cost structure so that it could be more cost competitive in the industry. (Tr., 11/23/98, Vol. 8, Part 2, p.8). He testified that rather than looking at making incremental changes in the way in which the work was getting done, Rockwell decided to go through a re-engineering process which he identified as a "clean sheet of paper" approach. (Tr., 11/23/98, Vol. 8, Part 2, p.10). Mr. Hannon testified that

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[6] Ron Rogers confirmed that the G Plus on defense Exhibit 69 and 70 was the official performance appraisal grade for Mr. Varga for January, 1996. (Tr., 11/19/98, p.4). Mr. Rogers confirmed that Exhibit 70 showed that he had raised the grade for Mr. Varga from a G to a G Plus and that Mr. Varga's performance appraisal from the next month, January of 1996, was a G Plus. (Tr., 11/19/98, p.9).

the objectives of the re-engineering process were (1) profitable growth, (2) significant cost reduction and (3) reducing the complexity of the business. (Tr., 11/23/98, Vol. 8, Part 2, pp.12-13).

Mr. Hannon testified that after the various re-design teams had made their recommendations as to how to re-engineer their work processes and after the re-design head count reduction implementation team had identified individuals who were to be included in the restructuring, Rockwell utilized its human resources information database of employee records to generate information relative to each employee who was identified for the head count reduction. (Tr., 11/23/98, Vol. 8, Part 2, p.33). He testified that some of the information that was compiled at that point in time related to age, gender and race. (Tr., 11/23/98, Vol. 8, Part 2, p.33). The purpose of gathering that information was to start an adverse impact analysis to make sure that Rockwell was not impermissibly adversely impacting any specific work group as a result of the head count reductions. (Tr., 11/23/98, Vol. 8, Part 2, pp.33-34). He identified Jim Pautsch as the individual who did the Adverse Impact Review. (Tr., 11/23/98, Vol. 8, Part 2, p.34). Mr. Hannon identified plaintiffs' Exhibit 32 as the document that Jim Pautsch generated for Rockwell to do the Adverse Impact Analysis. (Tr., 11/23/98, Vol. 8, Part 2, p.34). Mr. Hannon testified that after the analysis was conducted, Rockwell went back and looked at each person that was being reduced, specifically in terms of age, to see if there was anything abnormal in the selection process. (Tr., 11/23/98, Vol. 8, Part 2, p.36). No changes were made as a result of that review. (Tr., 11/23/98, Vol. 8, Part 2, p.36).

Mr. Hannon testified that, subsequently, approval of the reduction plan was sought and obtained from the Senior

Leadership Counsel. (Tr., 11/23/98, Vol. 8, Part 2, p.46). The presentation to the SLC took place on August 13, 1996. Mr. Hannon testified that the SLC was given, *inter alia,* statistical overviews as to what the impact to the organization by age, gender and by grade level. (Tr., 11/23/98, Vol. 8, Part 2, pp.46-47). That information was set forth on defendant's Exhibit 44. (Tr., 11/23/98, Vol. 8, Part 2, p.47).

Mr. Hannon testified that in preparing for the SLC presentation, an informal analysis was done in relation to the head count. Mr. Hannon began to testify as to the outcome of that analysis relative to age. Plaintiffs' counsel "objected". (Tr., 11/23/98, Vol. 8, Part 2, p.49). Her "objection" was actually a question as to what Mr. Hannon was referring. He stated that he was not referring to Exhibit 44 but, rather, was referring to the presentation to the SLC. (Tr., 11/23/98, Vol. 8, Part 2, p.50). Plaintiffs' counsel stated that she had no objection. (Tr., 11/23/98, Vol. 8, Part 2, p.50). There being no objection, Mr. Hannon testified as to the before and after reduction percentages for the various age groups. He testified that in the age group 55 and above, the before reduction percentage was eight and the after reduction percentage was seven. In the age group 45 to 54, the respective percentages were 30 percent. In the age group 35 to 44, the figures were 32 percent and 33 percent. In the age group 25 to 34, the figures were 33 percent and 34 percent. In the age group 25 and under, the figures were 7 percent and 6 percent. All of this testimony was given without any objection whatsoever from plaintiffs' counsel.

Mr. Hannon then testified that in the age 55 and above group, there were individuals who were eligible for retirement who asked if they could voluntarily participate in the reduction so that somebody else could stay on. (Tr.,

11/23/98, Vol. 8, Part 2, p.51). He testified that fact skewed the numbers in that age group higher. (Tr., 11/23/98, Vol. 8, Part 2, pp.51-52). At that point, plaintiffs' counsel objected on the ground that the "testimony is not in evidence." She argued that the information had been requested and asserted that it had not been provided to plaintiffs. (Tr., 11/23/98, Vol. 8, Part 2, p.52). Out of the presence of the jury, a discussion ensued.

Plaintiffs' counsel asserted that during discovery, plaintiffs had asked for ". . . any documents generated whatsoever concerning any statistical analysis whatsoever that the company did." (Underlining supplied.) (Tr., 11/23/98, Vol. 8, Part 2, p.53). She asserted that "this data" never came into light during discovery. (Tr., 11/23/98, Vol. 8, Part 2, p. 53). Defense counsel responded that the various computer generated data sheets that were generated that reflect the statistical information were provided to plaintiffs and that the head count reduction forms were provided to the plaintiffs. (Tr., 11/23/98, Vol. 8, Part 2, pp.53-54). Then, defense counsel stated the obvious: "Mr. Hannon is testifying from his memory." Defendant was not introducing any documents. (Tr., 11/23/98, Vol. 8, Part 2, p.54).

Judge Tarnow confirmed from plaintiffs' counsel that she had not deposed Mr. Hannon, despite the fact that he was on the witness list that was provided to her before the close of discovery. In response to Judge Tarnow's inquiry, defense counsel stated that the basis for Mr. Hannon's information would have been the same as that used by Mr. Pautsch (who conducted the adverse impact analysis); the head count implementation reduction forms and information that had been taken from the Rockwell employee information data base. (Tr., 11/23/98, Vol. 8, Part 2, p.56).

Defense counsel affirmed that those documents had been made available to the plaintiffs in the course of discovery. (Tr., 11/23/98, Vol. 8, Part 2, pp.56-57). Judge Tarnow reserved a ruling on the objection and stated that plaintiffs' counsel could cross-examine on this issue. (Tr., 11/23/98, Vol. 8, Part 2, p.57).

Plaintiffs' counsel did cross-examine Mr. Hannon concerning the "list of percentages of people who were reduced". (Tr., 11/23/98, Vol. 8, Part 2, p.107). Mr. Hannon testified that the percentages that he had testified to were the numbers that he remembered from the presentation to the SLC. He testified that those numbers were not documented anywhere. (Tr., 11/23/98, Vol. 8, Part 2, pp.108-109). Subsequently, the cross, redirect and re-cross examination of Mr. Hannon continued. Plaintiffs, thereafter, failed to pursue this issue further.

3. Gregory Brown.

During their case in chief, plaintiffs called Gregory Brown, Vice President of Organization and Management Resources at Meritor. (Tr., 11/17/98, Vol. 4(B), pp.4-5). Plaintiffs' counsel began her examination by questioning Mr. Brown concerning documents produced by Rockwell in response to plaintiffs' discovery requests. (Tr., 11/17/98, Vol. 4(B), pp.5-24). In the course of the examination of Mr. Brown, an issue arose as to whether or not Rockwell had complied with plaintiffs' discovery requests and with Judge Hackett's December 9, 1997 order. (Tr., 11/17/98, Vol. 4(B), pp.30). After a discussion which focused on defendant's Exhibits 60-64, plaintiffs' counsel acknowledged (1) that she had received all the material that Rockwell had in that regard, (2) that all of the information that she wanted to use was contained in the documents that had been

provided to her and (3) that she was satisfied that she had all the information that she needed. (Tr., 11/17/98, Vol. 4(B), pp.37-39).[7] Defense counsel then requested a jury instruction to dispel any suggestion by plaintiffs' counsel that Rockwell had not fully and completely responded to discovery concerning documents. (Tr., 11/17/98, Vol. 4(B), p.41). There being no objection from plaintiffs' counsel, Judge Tarnow instructed the jury that:

> "We've been discussing the [sic] what's called discovery, which is a pretrial exchange of information. And it has been determined that the information that Ms. Guerra is referring to has been and is – has been provided . . . ."

(Tr., 11/17/98, Vol. 4(B), p.45). The direct examination of Mr. Brown continued. (Tr., 11/17/98, Vol. 4(B), pp.46-63). Defense counsel reserved the right to cross-examine or examine Mr. Brown during its case in chief. (Tr., 11/17/98, Vol. 4(B), p.63).

Thirteen days later, on November 30, 1998, Rockwell called Mr. Brown during its case in chief. (Tr., 11/30/98, Vol. 10, p.5). Defense counsel began to question Mr. Brown concerning the testimony he had given two weeks earlier in connection with plaintiffs' Exhibit 19

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[7] Plaintiffs' counsel also stated on the record that she was not asking anymore for any documents associated with the Adverse Impact Analysis other than the three pages admitted as plaintiffs' Exhibit 32. (Tr., 11/17/98, Vol. 4(B), p.40).

"Individual W/Last Day Worked in August 1996", plaintiffs' Exhibit 20, a list of individuals affected by the August 30, 1996 restructuring and plaintiffs' Exhibit 21 "Engineers Hired January 1, 1995 through December 15, 1997". (Tr., 11/30/98, Vol. 10, p.9). Defense counsel stated that the seeming intent of the testimony elicited from Mr. Brown by plaintiffs' counsel two weeks earlier was to show that the "numbers weren't lining up between the three exhibits". (Tr., 11/30/98, Vol. 10, p.10). Mr. Brown was asked what he had done after he had testified on November 17, 1998. He testified that with respect to Exhibit 19, "Individuals W/Last Day Worked in August 1996", he asked his administrative assistant to go back into the payroll system and provide him with the reason for that last day worked. Plaintiffs' counsel objected to the "new information Mr. Brown found out" because it ". . . should have been given to us at the time, and I believe its irrelevant at this point . . . ." The objection was overruled. (Tr., 11/30/98, Vol. 10, p.11). Mr. Brown testified that out of the 20 people listed on Exhibit 19, the severance reason for ten was listed as early retirement. (Tr., 11/30/98, Vol. 10, p.12). Of the remaining ten individuals, five were engineers. Two of them were under 50 and three of them were over 50. (Tr., 11/30/98, Vol. 10, p.13). Mr. Brown was then asked if he looked into why there were 31 names on plaintiffs' Exhibit 20, the list of affected names. (Tr., 11/30/98, Vol. 10, p.14). He testified that any inconsistency between Exhibits 19 and 20 was attributable to the fact that two different dates were utilized to generate the lists and the list grew from 20 individuals to 31 individuals. (Tr., 11/30/98, Vol. 10, p.16). He testified that 11 of the 31 people listed on Exhibit 20 requested early retirement. (Tr., 11/30/98,

Vol. 10, p.16). Of the 19 individuals who were reduced,[8] 5 people were over 50 and 14 were under 50. (Tr., 11/30/98, Vol. 10, p.17).

With respect to plaintiff's Exhibit 21, engineers hired after January 1, 1995, Mr. Brown testified that he had gone back and determined that of the 200 persons listed, 51 were in Troy. Plaintiffs' counsel objected on the ground that the information had never been produced to her. Defense counsel responded that plaintiff had requested a list of engineers that were hired between January 1, 1995 through December 15, 1997 and that was what was provided to her. The objection was overruled. (Tr., 11/30/98, Vol. 10, p.18). Mr. Brown testified that out of the 200 engineers hired worldwide, 173 were hired before the reduction in force and 27 after. (Tr., 11/30/98, Vol. 10, p.19).

Mr. Brown also testified as to the apparent discrepancy between plaintiffs' Exhibit 32, the Adverse Impact Analysis, which showed 46 people affected by the restructuring and plaintiffs' Exhibits' 19 through 21 which showed 31 individuals. (Tr., 11/30/98, Vol. 10, p. 24). He testified that the other 15 were accounted for in activities that happened after August 30, 1996. (Tr., 11/30/98, Vol. 10, p.24). He testified that of those 15, some were retirements, some volunteered to be laid off so that they would receive severance and some co-op students went back to school. (Tr., 11/30/98, Vol. 10, p.25).

After defense counsel completed the examination of Mr. Brown, plaintiffs' counsel was afforded the opportunity

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[8] One person had quit. (Tr., 11/30/98, Vol. 10, p.17, Apx., at p.1957).

to cross-examine him. Mr. Brown was questioned extensively concerning the discrepancies which plaintiffs' counsel perceived to exist with respect to Mr. Brown's immediately preceding testimony and the testimony which he had given on November 17, 1998. (Tr., 11/30/98, Vol. 10, pp.30-65). During the course of the cross-examination, plaintiffs' counsel asked Mr. Brown if Rockwell ever provided plaintiffs with a full list of the information they requested for the people who were caught in the restructuring. (Tr., 11/30/98, Vol. 10, p.40). A side bar conference was then conducted. Plaintiffs' counsel argued that her purpose in pursuing that line of questioning was to show the jury that the defendant was trying to impeach "the lists we were provided . . . ." (Tr., 11/30/98, Vol. 10, p.34). Defense counsel argued that plaintiffs' counsel was again improperly attempting to suggest that Rockwell had not fully complied with plaintiff's discovery request and the December 9, 1997 order. Judge Tarnow directed the lawyers to find and provide him with a copy of the December 9, 1997 order and directed plaintiffs' counsel to continue her questioning. (Tr., 11/30/98, Vol. 10, pp.40-44).

The issue was revisited the morning of the next day, December 1, 1998. Judge Tarnow stated that he had asked the lawyers to ". . . try and decide exactly what happened and whether, in fact, there were discovery violations or not." (Tr., 12/01/98, Vol. 11, p.3). Plaintiffs' counsel responded that ". . . we stipulated to a lot of discovery requests". (Tr., 12/01/98, Vol. 11, p.4). She said that the disagreement related to Exhibit 19 "Individuals W/Last Day Worked in August 1996", which showed 20 names, 10 of which Mr. Brown had testified were early retirees and Exhibit 28 "severed automotive employees as of 08-01-96". (Tr., 12/01/98, Vol. 11, p.4). She stated that she had reviewed both Exhibits and confirmed that Exhibit 28 did

state that 10 of the individuals listed on Exhibit 19 were listed as having taken early retirement. (Tr., 12/01/98, Vol. 11, p.5).[9] She then stated that 4 of those 10 individuals were plaintiffs in an unrelated lawsuit filed against Rockwell alleging age discrimination. She proposed to enter Exhibit 44, ". . . the lawsuit itself mentioning the four people (apparently to show that Mr. Brown's statement and Exhibit 28's evidence regarding 10 early retirements was inaccurate). (Tr., 12/01/98, Vol. 11, p.5).

Judge Tarnow interrupted plaintiffs' counsel and had her confirm that the information was provided to her during discovery and that the individuals were, in fact, marked early retirement. (Tr., 12/01/98, Vol. 11, p.6). Plaintiffs' counsel argued that she understood that Mr. Brown was prepared to come back and testify that individuals who had chosen to take early retirement after they had been involuntarily terminated would be listed as early retirement. She wanted to know how many other people on the list that were listed as early retirement were actually terminated. (Tr., 12/01/98, Vol. 11, p.6). Judge Tarnow told her that that was a question she could have asked during discovery. (Tr., 12/01/98, Vol. 11, p.6). He told her that she had had the information concerning early retirements for nine months. (Tr., 12/01/98, Vol. 11, p.7).

Judge Tarnow then asked defense counsel how to explain the fact that the individuals who were plaintiffs in the unrelated lawsuit were listed as having taken early retirement. Defense counsel stated that those individuals

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[9] A comparison of Exhibits 19 and 28 show that those individuals were Awe, Bornais, D'Souza, Fuller, Gonlou, Heirman, Konior, Kucharski, Phillips and Reyes.

were slated for reduction on an involuntary layoff basis and at some later point in time, they elected to take early retirement. (Tr., 12/01/98, Vol. 11, pp.7-8). Judge Tarnow asked the lawyers why he shouldn't just simply tell the jury that fact. (Tr., 12/01/98, Vol. 11, p.8). Plaintiffs' counsel stated that it would not be satisfactory if there was a stipulation. She argued that because Rockwell gave plaintiffs a list of 20 people who were actually HVS restructuring terminees[10] and because ". . . no one has ever argued before that they were not part of the HVS restructuring . . .", ". . . either all of the names stay on or . . . we have to object." (Tr., 12/01/98, Vol. 11, p.9). Both defense counsel and Judge Tarnow were confused by the argument. (Tr., 12/01/98, Vol. 11, p.9). Plaintiffs' counsel said that she wanted to tell the jury that Mr. Brown was mistaken when he said that those individuals had taken an early retirement. Judge Tarnow suggested that the jury be told that those people on the list (Exhibit 19) who were listed as early retirement (on Exhibit 28) took their early retirement because they were on the list for reduction, because that was what the facts were. (Tr., 12/01/98, Vol. 11, p.10). Plaintiffs' counsel objected because she wanted to tell the jury that those individuals were involuntarily terminated first. (Tr., 12/01/98, Vol. 11, p.11). Judge Tarnow responded that they were not terminated - they were listed for termination. (Tr., 12/01/98, Vol. 11, p.11).

Judge Tarnow then attempted to clarify the issue. (Tr., 12/01/98, Vol. 11, p.11). Judge Tarnow stated that before Mr. Brown had testified, the question was whether all

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[10] Actually, that is not true. Exhibit 20 which lists the "20 people" is entitled "Individuals W/Last Day Worked in August 1996".

of the people listed in the materials provided in plaintiffs' Exhibit 28 were included in the calculation made by plaintiffs' statistician. (Tr., 12/01/98, Vol. 11, pp. 11-12). Judge Tarnow asked whether all of those people (apparently those listed in Exhibit 28 as having taken early retirement) were used in the calculation made by the statistician. Plaintiffs' counsel stated that the statistician did not include those people because they were listed as early retirement. (Tr., 12/01/98, Vol. 11, p.12).

Judge Tarnow suggested that the situation could be rectified by a stipulation telling the jury that those individual's early retirement was caused by them being listed for termination or reduction. (Tr., 12/01/98, Vol. 11, pp.12-13). Judge Tarnow wanted to know if plaintiffs' counsel was satisfied if the jury was told that at least four people who were listed as taking early retirement were, in fact, part of the restructuring. Judge Tarnow reminded plaintiffs' counsel that this information was made available to her in discovery for months and that the presumption is that she had read what she received in discovery. (Tr., 12/01/98, Vol. 11, p.15). After much discussion, a stipulation was eventually reached to resolve the dispute. (Tr., 12/01/98, Vol. 11, pp.16-26). Judge Tarnow read that stipulation into the record:

> "One is that all of the discovery orders and requests have been complied with prior to trial. So, that's not a concern of yours.
>
> As to the second point, when Mr. Brown testified yesterday and talked about early

> retirement, he indicated that the computer elected early retirement – or showed early retirement for ten people, because that was the last entry or employment action which was taken with respect to each of the employees, the four employees. They were, in fact, included in the reduction in force and were laid off prior to electing the early retirement, and therefore there's no need for Mr. Brown to be called back as a witness. And you should take Exhibit 19 as all the people listed in Exhibit 19 were in fact included in the reduction in force. So, Exhibit 19 is exactly the same as before Mr. Brown testified." (Underlining supplied).

(Tr., 12/01/98, Vol. 11, p.27). When asked if that accurately reflected the agreement, plaintiffs' counsel responded that the first point was a "little broader" than what she had agreed to. Judge Tarnow told her that she could take it up at the next break. (Tr., 12/01/98, Vol. 11, p.27). At the next break, plaintiffs' counsel acknowledged that the first point in the stipulation read to the jury was accurate with respect to evidence concerning early retirements but that it was her position that she was not provided all of the head count reduction forms which had been requested. (Tr., 12/01/98, Vol. 11, pp.94-95).

4. Denial of plaintiffs' motion for judgment as a matter of law.

At the close of plaintiffs' proofs, defendant moved for judgment as a matter of law. (Tr., 11/20/98, Vol. 7, pp.71-79). The motion was denied. (Tr., 11/20/98, Vol. 7, p.79). In the course of denying defendant's motion for judgment as a matter of law, Judge Tarnow added that judgment as a matter of law for the plaintiffs was similarly not warranted:

> "That doesn't mean that if Ms. Guerra were to stand up and make a motion for a directed verdict in her favor, that I would grant it, because it's the jury's function now to decide the factual question as to whether or not there was a legitimate business reason and a legitimate use of criteria or whether there was a pretext based on bias." (Underlining supplied).

(Tr., 11/20/98, Vol. 7, p.79).

Notwithstanding Judge Tarnow's statement that he would deny a motion for directed verdict (actually for judgment as a matter of law) if made by the plaintiffs, they did make such a motion at the conclusion of all the evidence. (Tr., 12/01/98, Vol. 11, p.108). Plaintiff's counsel asserted that there was direct evidence of age discrimination. Judge Tarnow responded that there was also evidence that age was not a factor in the decision to

terminate Mr. Varga. (Tr., 12/01/98, Vol. 11, p.109). Plaintiffs' counsel then argued that there was circumstantial evidence that created an inference of age discrimination. (Tr., 12/01/98, Vol. 11, p.110). Judge Tarnow asked plaintiffs' counsel if she knew what an inference was. She responded that an inference is something that a person can glean from evidence. Judge Tarnow responded that the "person" or "someone" who can draw an inference from evidence is the jury and not the court. Judge Tarnow denied the motion since he, correctly, understood plaintiffs' counsel's argument to be that she had simply presented facts in support of plaintiffs' age discrimination claim, which ". . . then makes it a jury question." (Tr., 12/01/98, Vol. 11, pp.110-111).

REASONS FOR DENYING THE PETITION

The Respondent contends that it is unnecessary for this Court to review the decision of the Sixth Circuit Court of Appeals in the present case. The Sixth Circuit correctly determined that plaintiffs' argument concerning documents introduced by Respondent at trial had been waived as a result of plaintiffs' counsel's failure to object to the admission of those documents.

In the Statement of The Case section of their Petition, plaintiffs, under subsection (E), discuss "discovery [allegedly] withheld by Defendant." They discuss (1) Trial Exhibits 69 and 70, (2) head count reduction forms and (3) testimony of Gregory Brown. However, in the Argument section of their Petition, plaintiffs discuss (and this is apparent from the context) only trial exhibit 69 and 70, the documents which Respondent used, successfully, to impeach the testimony of plaintiffs' witness, Larry Lemanski. Since plaintiffs' counsel failed to object to the admission of these documents in the district court, Tr., 11/16/98, Vol. III, pp.40-42 and, as a consequence, failed to raise this issue in the district court, this Court should decline to consider the issue. The general rule is that this Court does not decide questions not raised or involved in the lower court. *Youakim v. Miller,* 425 U.S. 231, 234; 96 S. Ct. 1399; 47 L. Ed. 2d 701 (1976); *Adickes v. Kress & Co.,* 398 U.S. 144, 147; 90 S. Ct. 1598; 26 L. Ed. 2d 142 (1970). Respondent contends that the general rule should be applied here.

With respect to plaintiffs' other (actually first) argument concerning the denial of their motion for judgment as a matter of law, Respondent contends that both the district court and the Sixth Circuit correctly ruled that judgment as a

matter of law in favor of the plaintiffs, the parties having the burden of proof, was properly denied because Respondent presented sufficient evidence from which the jury could, and indeed did, reasonably and legitimately conclude that Mr. Varga's age was not a determining factor in Respondent's decision to include him in the restructuring and reduction in force.

I. WHILE IT IS CORRECT TO SAY THAT THE STANDARD FOR SUMMARY JUDGMENT IS THE SAME AS THE STANDARD FOR JUDGMENT AS A MATTER OF LAW, THAT LEGAL PRINCIPLE WAS NOT BEFORE THE UNITED STATES DISTRICT COURT OR BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. THE ISSUE WHICH WAS PRESENTED TO, AND DECIDED BY, BOTH LOWER COURTS INVOLVED THE DISTINCT QUESTION RELATING TO HOW A MOTION FOR JUDGMENT AS A MATTER OF LAW (OR FOR THAT MATTER A MOTION FOR SUMMARY JUDGMENT) IS TO BE DECIDED WHEN THE MOVANT IS THE PARTY HAVING THE BURDEN OF PROOF. THE DISTRICT COURT PROPERLY DENIED, AND THE CIRCUIT COURT PROPERLY AFFIRMED THE DENIAL OF, PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW MADE AT THE CONCLUSION OF THE PROOFS.

The argument made by the plaintiffs in this regard is without merit. It is without merit because it fails to acknowledge that the standard for granting judgment as a matter of law in favor of the party having the burden of proof, *i.e.*, the plaintiffs here, is different from, and higher than, the standard for granting judgment notwithstanding the verdict in favor of a defendant.

A motion for judgment notwithstanding the verdict[11] raises the issue of whether there was a question of fact for the jury to decide. *Chappell v. G.T.E. Products*, 803 F.2d 261, 266 (6th Cir. 1986), *cert. denied* 480 U.S. 919; 107 S. Ct. 1375; 94 L. Ed. 2d 690 (1987). Judgment notwithstanding the verdict may be granted only if reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Toth v. Yoder Co.*, 749 F.2d 1190, 1194 (6th Cir. 1984). The appellate court is bound by the same standard of review. *Hawley v. Dresser Indus., Inc.*, 958 F.2d 720 723 (6th Cir. 1992); *Roush v. KFC National Mgt. Co.*, 10 F.3d 392, 395 (6th Cir. 1993). *See also Kupkowski v. Avis Ford, Inc.*, 395 Mich. 155, 168; 235 N.W.2d 324 (1975).

The test for granting judgment as a matter of law is different, and the bar is significantly higher, when judgment as a matter of law is sought by the party having the burden of proof.

Courts are understandably reluctant to grant summary judgment,[12] direct a verdict or grant judgment

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[11] The 1991 Amendment to Fed. R. Civ. P. 50(b) changed the name of such a motion to a renewed motion for judgment as a matter of law. The name change did not change the standard under which such a motion may be granted.

[12] The standard for granting summary judgment mirrors the standard for a directed verdict (now judgment as a matter of law – Fed. R. Civ. P. 50). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986).

notwithstanding the verdict in favor of a party having the burden of proof. *Hunt v. Cromartie,* 526 U.S. 541; 119 S. Ct. 1545, 1552; 143 L. Ed. 2d 731 (1999); 5A, Moore's *Federal Practice*, ¶ 50.02[1]. p. 50-31; 9A Wright & Miller, *Federal Practice and Procedure* § 2535 (". . . Courts often caution that granting a judgment as a matter of law for the party bearing the burden of proof is reserved for extreme cases . . . . To the extent that the party with burden of proof has established the elements of his case by testimony that the jury is not at liberty to disbelieve . . . judgment as a matter of law in that party's favor may be granted . . . .") (underlining supplied); *Service Auto Supply Co of PR v. Harte & Co.*, 533 F.2d 23 (1st Cir. 1976) (directed verdict in favor of party having the burden of proof is permissible only where the case has been established by testimony that the jury is not at liberty to disbelieve). Judgment as a matter of law in favor of a party having the burden of proof is proper if, but only if, that party produces unimpeached and uncontradicted evidence to prove his case and the opposing party produces no evidence to disprove it. *See, e.g., Daniel J. Hartwig & Assoc., Inc. v Kanner,* 913 F.2d 1213, 1221 (7th Cir. 1990) (no credible evidence to sustain a verdict in favor of party against whom motion is made); *Pence v. United States,* 316 U.S. 332; 62 S. Ct 1080; 86 L. Ed. 1510 (1942); *State Auto Ins. Co. v. Boatwright,* 184 F.3d 492, 498-499 (6th Cir. 1999) ("a ruling in favor of the plaintiffs on this issue would require us to find that the defendants offered no credible evidence contesting the plaintiffs' theory of liability").

Thus, judgment as a matter of law in favor of the party with the burden of proof is appropriate when and only when the evidence presented by the plaintiff would require – as distinguished from permit – the jury to rule in favor of the

plaintiff.[13] *Hunt v. Cromartie, supra; Oney v. Ratliff,* 183 F.30 93, 895 (Fed. Cir. 1999).

The higher standard applied to motions for judgment as a matter of law brought on behalf of the party having the burden of proof was not satisfied in this case. Both lower courts correctly recognized this fact.[14]

In order to successfully carry the ultimate burden in an age discrimination case, the plaintiff must prove that age was a determining factor in the employer's decision. *Matras v. Amoco Oil Co.,* 424 Mich. 675, 683-684; 385 N.W.2d 586 (1986); *Brocklehurst v. PPG Industries, Inc.,* 123 F.3d 890, 895 (6th Cir. 1997).

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[13] The drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255; 106 S. Ct. 2505; 91 L. Ed. 2d 202 (1986).

[14] To be sure, the Sixth Circuit, although ultimately correctly concluding that ". . . it cannot be said that the reasonable minds could not differ on the central question of whether or not Varga's age was the motivating reason for his layoff . . .," did state that ". . . while the evidence recounted in plaintiffs' brief would be enough to withstand summary judgment, . . . the standard for judgment as a matter of law is much higher." At most, the Sixth Circuit can be criticized for imprecision in its writing. It is apparent from that Court's analysis that it meant that the standard for judgment as a matter of law in favor of the party having the burden of proof is much higher than the standard for denying summary judgment and thereafter submitting the case to the jury.

The "bottom-line requirement" of what a plaintiff must establish in any age discrimination case is that age was a determining factor in the employment decision. *Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561; 463 N.W.2d 758 (1990).

In a discrimination case, liability necessarily depends on whether the protected trait, *i.e.*, age, actually motivated the employer's decision. A discrimination claim cannot succeed unless the employee's protected trait actually played a role in the employer's decision-making process and had a determinative influence on the outcome. *Hazen Paper Co. v. Biggins,* 507 U.S. 604; 113 S. Ct. 1701, 1706; 123 L. Ed. 2d 338 (1993). *See also St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502; 113 S. Ct. 2742; 125 L. Ed. 2d 407 (1993). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253; 101 S. Ct. 1089; 67 L. Ed. 2d 207 (1981); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143; 120 S. Ct. 2097; 147 L. Ed. 2d 105 (2000).

When plaintiffs' argument is measured against these standards, there can be but one conclusion and that is that plaintiffs' motion for judgment as a matter of law was properly denied.

One argument made by plaintiffs at the circuit court level demonstrates their misunderstanding of the circumstances under which judgment is a matter of law may be granted in favor of the party having the burden of proof. Plaintiffs contended that their motion for judgment as a matter of law should have been granted because, according to them, the great weight of the evidence established all of

the elements of their age discrimination claim. Plaintiffs did not and do not understand the difference between the sufficiency of evidence and the weight of the evidence. The determination of a case cannot be withheld or withdrawn from the jury and given to one party at the direction of the court in violation of the right to have issues of fact determined by the jury. Therefore, the critical question in deciding whether to grant judgment as a matter of law is whether there is an issue of fact which must be submitted to the jury. While a motion for a new trial may be granted if the verdict is against the great weight of the evidence, judgment as a matter of law may be granted if, and only if, there is insufficient evidence to make an issue for the jury. In making a "great weight of the evidence" argument, plaintiffs implicitly acknowledged the existence of evidence offered by the defendant which was to be weighed against their evidence and, therefore, implicitly acknowledged the existence of questions of fact. *See National Equipment Rental, Ltd. v. Stanley,* 177 F. Supp. 583 (D.C. N.Y. 1959). The acknowledged existence of questions of fact for jury resolution demonstrates beyond question the propriety of the denial of plaintiffs' motion for judgment as a matter of law.

II. THIS COURT SHOULD DECLINE TO REVIEW PLAINTIFFS' ARGUMENT CONCERNING THE ADMISSION OF EVIDENCE USED SOLELY FOR THE PURPOSE OF IMPEACHMENT BECAUSE THE ARGUMENT MADE BY PLAINTIFFS IN THE SIXTH CIRCUIT WAS NOT MADE IN THE DISTRICT AND THE ARGUMENT MADE BY THE PLAINTIFFS NOW WAS NOT MADE IN EITHER LOWER COURT.

At the Sixth Circuit level, plaintiffs argued that Trial Exhibits 69 and 70 had been improperly admitted. Yet, it is undisputed that their lawyer failed to object to the admission

of those documents which were used by Respondent to impeach plaintiffs' witness. Under these circumstances, the argument has not been preserved for appellate review since evidentiary rulings are reviewed under an abuse of discretion standard and one cannot say that a trial judge has abused his discretion when never asked to exercise it.[15] Now, in their Petition, plaintiffs, for the first time in this case, accuse Respondent of committing "fraud on the court rules." A question presented in a petition which was not raised in the Court of Appeals is not properly before this Court. *Delta Airlines v. August,* 450 U.S. 346, 362; __ S. Ct. __; __ L. Ed. 2d (1981). Simply put, raising an issue for the first time in a case in a petition for writ of certiorari before this Court is too late.

There are additional reasons why this Court should decline to consider the issue. The case relied on by the petitioners, *Demjanjuk v. Petrovsky,* 10 F.3d 388 (6th Cir. 1993), and the cases which it in turn relies on, *Hazel-Atlas Glass Co. v. Harford Empire Co.,* 322 U.S. 238; 64 S. Ct. 997; 88 L. Ed. 1250 (1944) and *U.S. v. Throckmorton,* 98 U.S. 61; 25 L.Ed. 93 (1878), are distinguishable at their

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[15] The failure to timely object or file a motion to strike evidence waives the right to have the evidence excluded and constitutes a failure to preserve the issue for appellate review. F.R.E. 103(a)(1); *Helminski v. Ayerst Laboratories, a Div. of American Home Products,* 766 F.2d 208, 211 (6th Cir. 1985); *Torres v. Johnson Lines,* 932 F.2d 748, 752 (9th Cir. 1991). The failure to timely object to testimony on the ground that the entire content of such testimony had not been disclosed during discovery constitutes a waiver of the objection. *Finch v. Hercules, Inc.,* 941 F. Supp. 1395, 1415 (D. Del. 1996).

cores. The fraud committed in *Demjanjuk, supra,* was the suppression of exculpatory evidence. The fraud in *Hazel-Atlas Glass Co., supra,* and *Throckmorton, supra,* consisted of presenting false documents to the Court. Common to all three cases was a suppression of the truth. Here, by contrast, Respondent's use of Trial Exhibit 69 and 70 resulted in the truth being told.

Lastly in this regard, Respondent contends that its actions in not disclosing documents which were used solely for impeachment purposes at trial to establish the truth were justified and correct. Case law (*see Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641 (D. Or. 2000) and the cases cited therein) and logic (production or even identification of impeachment evidence completely destroys its value) support Respondent's position. This argument will be set forth in depth in the event that this Court grants certiorari.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,
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